

DUPLICATE  
ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FCC MAIL SECTION  
FCC 93M-455

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In re Applications of	)	MM DOCKET NO. 93-94 ✓
	)	DISPATCHED BY
SCRIPPS HOWARD BROADCASTING COMPANY	)	File No. BRCT-910603KX
	)	
For Renewal of License of Station WMAR-TV	)	
Baltimore, Maryland	)	
	)	
and	)	
	)	
FOUR JACKS BROADCASTING, INC.	)	File No. BPCT-910903KE
	)	
For a Construction Permit for a New	)	
Television Facility on Channel 2	)	
at Baltimore, Maryland	)	

MEMORANDUM OPINION AND ORDER

Issued: July 9, 1993; Released: July 12, 1993

Background

1. This is a ruling on a Motion To Enlarge Issues To Tower Site that was filed on May 13, 1993, by Scripps Howard Broadcasting Company ("Scripps Howard"). An Opposition was filed on May 26, 1993, by Four Jacks Broadcasting, Inc. ("Four Jacks"). An Opposition also was filed by the Bureau on May 26, 1993. A Consolidated Reply was filed on June 8, 1993 by Scripps Howard. On June 10, 1993, Four Jacks filed a Motion To Strike an engineering study that accompanied the Reply. Scripps Howard filed an Opposition on June 18, 1993.<sup>1</sup>

2. Scripps Howard seeks the addition of a series of issues relating to Four Jacks' tower site where it proposes to locate the station's antenna. The issues would raise questions about the site's suitability, the likelihood of obtaining zoning relief, the adequacy of an antenna, whether there was a false site certification, whether there was a misrepresentation of the tower's height, and whether Four Jacks is financially qualified to obtain a new site. Scripps Howard also seeks a Section 1.65 reporting issue for a failure to disclose the site's true tower height.

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<sup>1</sup> The Motion To Strike is granted in a separate ruling. See Order FCC 93M-454 issued July 9, 1993.

### Facts

#### The Proposed Site

3. The proposed site is owned by Cunningham Communications, Inc. ("Cunningham"), a corporation which is wholly owned by the principals of Four Jacks. The site is located at 1200 North Rolling Road, Catonsville, Maryland. Scripps Howard asserts that the site is unsuitable because there are eighty tenants on the tower and at least one, WPOC(FM), will need to be removed; the site is zoned residential which if unchanged would preclude the use of the tower for a Channel 2 antenna; and the tower is not structurally adequate for the intended use.

4. There is no dispute that Four Jacks owns the Catonsville site on which there is an existing tower. It is on that tower that Four Jacks intends to erect an antenna. It is also on that same tower that WPOC(FM) presently has an antenna that would be in the way. Four Jacks asserts in its Opposition that in its capacity as the tower owner, it is not necessary for Four Jacks to obtain permission from WPOC(FM), a tenant, to move it down the tower to make room for a Channel 2 antenna. There is no evidence that the owner of WPOC(FM) would object to moving or that there would be any opposition to Four Jacks locating its antenna where it chooses on its own tower. There is no basis found from the facts presented that the Cunningham tower will not be available to Four Jacks for a Channel 2 antenna.

#### Zoning

5. Scripps Howard has produced a letter dated February 12, 1992, from Mr. W. Carl Richards, Jr., who is a Baltimore zoning coordinator, to Stephen J. Nolan of Towson, Maryland, a local zoning attorney for Scripps Howard. Mr. Richards reports that zoning records reflect three actions taken on the site: On June 12, 1969, the land was granted an exception for a radio/TV tower to be erected at a height of 660 to 850 feet; on February 27, 1975, a special exception was granted to permit the erection of a second tower at a height of 75 feet; and on January 20, 1977, a special exception was granted to extend the first tower's approval height from 850 feet to 1029 feet. The tower construction never exceeded 660 feet. Now, according to Mr. Richards, the additional height authorization that was granted in 1977 has lapsed unless some work had been undertaken to extend the height.

6. Four Jacks notes that the tower was originally built to a height of over 700 feet to accommodate the WBFF-TV antenna from 1968 to 1987. Therefore, the work was undertaken to construct above 660 feet. The WBFF antenna was relocated to another site in 1987. Therefore, Scripps Howard may be correct in asserting that the tower height is back down to 660 feet. But from the facts as presented, it cannot be concluded that a substantial question has been raised as to whether there has been a waiver of the tower's original height authorization. Nor can it be concluded that there is a

substantial question as to whether there will be an irremedial zoning obstacle to the proposal of Four Jacks to erect the Channel 2 antenna on the Cunningham tower.<sup>2</sup>

#### Structural Suitability

7. Scripps Howard retained an engineering expert to assess the structural suitability of the Cunningham tower for an additional antenna. A Report was submitted as Exhibit H to the Scripps Howard Motion.<sup>3</sup> Four Jacks has also retained an engineer who submitted a rebuttal report which would frame subordinate but time-consuming issues of experts' credibility/reliability/soundness of technical conclusions if the substantive issue were added. The Scripps Howard report begins with a series of assumptions, the first of which is that Four Jacks will erect the antenna at the top of the tower at its present height which is estimated to be 666 feet. In fact, Four Jacks proposes to erect the antenna first by reducing the tower's structural steel to a height of 602 feet and then mounting the Channel 2 antenna atop the diminished tower. In that respect, the Scripps Howard engineer was evaluating the tower under a wrong assumption of a material fact which detracts significantly from the reliability of the study. Also, as indicated in fn.2 above, the Scripps Howard engineer has concluded that Four Jacks has "squeezed costs" in its design which is an unsupported conclusion and an indication of subjective bias that may permeate the entire report. Finally, as noted by Four Jacks, there will be a final analysis of structural safety at the time of the construction which makes the Scripps Howard analysis premature.<sup>4</sup>

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<sup>2</sup> In 1992, Cunningham requested that the zoning for its tower site be changed to commercial from its present residential. The request was denied. It is not clear whether that denial is final. However, the Cunningham tower has continued to operate on a site that was zoned residential by virtue of an exception or a series of exceptions. There is no information provided that raises a substantial question of fact as to whether the exception would be rescinded. That event would require the removal of the tower and the displacement of approximately 80 antennas. There is nothing stated in Mr. Richard's letter to suggest that such an adverse development is impending.

<sup>3</sup> The report was based on a structural computer program that was especially designed to evaluate the structure. The engineer, who has thirty years of experience, also made a visual inspection, admittedly from afar. Thus he had to make assumptions. Among his assumptions was his perceived need for two 3-1/8 inch rigid transmission lines rather than the one transmission line specified by Four Jacks' engineer. Scripps Howard's engineer concluded that Four Jacks was trying to "squeeze costs" by planning a "low reliability antenna system". This is a speculative and factually unsupported conclusion that is outside the domain of the engineer's expertise.

<sup>4</sup> It would seem that a reasonable site owner would be monitoring structural safety throughout the construction period in order to satisfy the insurance carrier that provides the public liability coverage.

### Misrepresentation And Reporting Issues

8. The concern about Four Jacks' tower height was addressed by the Bureau in its decision to add an air hazard issue in the designation order. The relevant facts about tower height were before the Bureau at the pre-designation stage. That issue was resolved in Four Jacks favor by the Presiding Judge's summary decision. See Memorandum Opinion and Order, FCC 93M-315, released June 1, 1993. As recited above, Four Jacks had a TV antenna on the tower from 1968 to 1987. The height of the former antenna structure when added to the tower was 381 meters. When the antenna was removed the height was lowered by a factor of 40 feet. But Four Jacks considered the authorized air space to remain at 381 meters for future potential use. The FAA was not notified of the height reduction or of Four Jacks' later proposal for Channel 2 and its use of the full 381 meters. The facts indicate that Four Jacks believed that it could construct its antenna for Channel 2 in accord with the space authorized by the FAA.

9. Form 301 requires the disclosure of the proposed height of an antenna/tower assembly which for Four Jacks would be 381 meters. There is no requirement to disclose the towers' present usage of the authorized air space. Four Jacks' disclosure on Form 301 was inaccurate and had the effect of being misleading by indicating "N/A" to the question which asks if the applicant's proposal involves a change in the height of the structure. See Form 301, Section V-C, Question 3. But the Bureau considers it to be de minimis and the Presiding Judge agrees with that position. Of greatest importance is the fact that the Bureau had sufficient information to flag the air hazard concern before designation and the Commission was not misled by Four Jacks' unsatisfactory 301 disclosure. And as noted by the Bureau, the "Vertical Plan Antenna Sketch" submitted by Four Jacks shows graphically that the 381 meters includes an antenna at the top of the tower. Therefore, no one considering all relevant disclosure was materially misled.

### Discussion

10. Scripps Howard requests seven substantive issues added against Four Jacks and one conclusory issue as to whether or not Four Jacks is qualified to hold a Commission license. None of those issues will be added because it is concluded that there have been no issues framed under the facts alleged which raise a substantial question concerning the qualifications of Four Jacks as an applicant in this case. Washoe Shoshone Broadcasting, 5 F.C.C. Rcd 5561, 5562 (Comm'n 1990).

11. The keystone fact to consider is that the availability of the Cunningham tower is questioned where the facts establish that the Four Jacks principals are the owner and where there are no facts shown that raise a substantial question about Four Jacks' continuous control over the use of the tower which is proposed for the location of the Channel 2 antenna. The Commission has held recently that a presiding judge had acted properly in refusing to add a requested issue where there was evidence offered of a

binding option from the site owner to a third person. Although the document should speak for itself, there was evidence of the owner's opinion that the option was non-exclusive. The opponent rebutted with additional evidence showing that the third person's option was an exclusive one. The Commission held under such circumstances that there "was no present impediment to implementation of Saltaire's plan to install its antenna on Goguen's [the owner's] tower." Saltaire Communications, Inc., 8 F.C.C. Rcd 1385, 1386 (Comm'n 1993).<sup>5</sup> Here, Four Jacks is the owner of the tower and therefore Four Jacks is presumed to have control over how it is to be used. The only qualifying restriction assumed here is that WPOC(FM) and the other tenants would be entitled to reasonable notice that they must move to another location in order to accommodate Four Jacks' Channel 2 antenna. But that consideration raises issues which are private landlord-tenant matters which are of no direct concern to the Commission.

12. With respect to the zoning issue, it is established that thus far Four Jacks and the tenants on the Cunningham tower which number approximately 80 have had uninterrupted use of the tower through exceptions granted to the zoning code. The Commission assumes that an applicant will be able to obtain zoning authority for an antenna tower where a zoning change is required. Teton Broadcasting Limited Partnership, 1 F.C.C. Rcd 518, 519 (Comm'n 1986). In this case it is not established that a zoning change from residential to commercial will be required since exceptions have been granted. Therefore, this is an even stronger case for not adding a zoning issue because there has not been an adverse determination by a zoning board. Cf. J. Sherwood, Inc., 63 F.C.C. 2d 151, 156 (Review Bd 1976).

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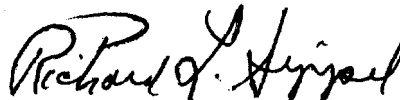
<sup>5</sup> The Saltaire decision is distinguishable in part from this case. There, the Commission noted that there should not have been decisional reliance placed on Goguen's [the owner's] statements which were directly controverted with evidence. Id. Also, the Commission applied a higher standard of the burden of persuasion because the issues were not timely sought. Id. But the case has precedential value here because the owner of the tower here is the applicant that is proposing the use of the tower. Therefore, there is a presumption of control by the tower owner in the absence of documentation which shows that Four Jacks has in fact not retained any reversionary interest, that WPOC(FM) has an absolute right to maintain its present position on the Cunningham tower, and that WPOC(FM) would refuse to abide by any demand or request of Four Jacks that the WPOC(FM) antenna be moved to a lower place on the tower. Scripps Howard notes that a lower location will require WPOC(FM) to increase its power in order to maintain its current signal strength. That would mean a higher operating cost for WPOC(FM). But if that is the case the question of who bears some or all of such consequential costs could be negotiated. The intricacies of the variables do not alone warrant the addition of an issue. Cf. Priscilla L. Schwier, 4 F.C.C. Rcd 2659, 2660 (Comm'n 1989) (issues will not be added out of curiosity).

13. With respect to the remaining issues, the tower suitability issue is too speculative to justify adding an issue. See Priscilla L. Schwier, supra. It would also expand the litigation of this case to a battle of the experts on the suitability of a tower design which does not raise a substantial question for litigation. The requested site certification issue is denied because it appears that by virtue of the rights of ownership, Four Jacks has a reasonable assurance of the availability of its Cunningham tower. The misrepresentation issue with respect to the tower height is denied because there is no substantial question of an intent to deceive. See Fox River Broadcasting Co., 93 F.C.C. 2d 127, 129 (Comm'n 1983) (absent a showing of intent to deceive or mislead, the Commission will not designate a misrepresentation issue). In light of the preceding rulings on the substantive issues that were requested and denied, the requested issue under Section 1.65 for a failure to disclose a correct tower height and the requested financial issue for the cost of another tower are denied as moot.

Ruling

Accordingly, IT IS ORDERED that the Motion To Enlarge Issues Related To Tower Site that was filed by Scripps Howard Broadcasting Company on May 13, 1993, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel  
Administrative Law Judge